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Hostile Work Environment and the Objective Reason-Ableness Conundrum: Deriving a Workable Framework from Tort Law for Addressing Knowing Harassment of Hypersensitive Employees

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HOSTILE WORK ENVIRONMENT AND THE OBJECTIVE REASONABLENESS CONUNDRUM: DERIVING A WORKABLE FRAMEWORK FROM TORT LAW FOR ADDRESSING KNOWING HARASSMENT OF HYPERSENSITIVE EMPLOYEES†

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Ms. Smith works for a supervisor who does not believe women belong in the workplace. He wants to force her out, but based on the company's harassment policy, he knows he cannot subject her to conduct that a reasonable person would find severe or pervasive, because that would be illegal discrimination, and his employer would likely take action against him. However, he also knows that she is particularly sensitive to loud noise. She cannot function around loud noise, and becomes extremely nervous. This has never been a problem, because the office is relatively quiet, and she can tolerate short bursts of noise. In an effort to make working conditions unbearable for her, he decides to speak loudly whenever he is near her office, and several other male employees do the same. He also sets up a new photocopying machine, which makes a lot of noise, close to her office. He never makes a sexual or gender-based comment in the office, and does not otherwise interfere with Ms. Smith's working conditions. The noise, however, substantially interferes with her work, causes her to have several emotional outbursts in the office, and finally a nervous breakdown. She knows that the supervisor is aware of her unusual sensitivity, and that she was subject to the noise due to her gender—a friend overheard the supervisor joking about it with another employee.

Under current hostile work environment analysis, Ms. Smith could not succeed on a claim of harassment, despite the fact that her supervisor knowingly subjected her to harassment based on her gender.[1] The

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[1] As will be discussed throughout this Article, this result is a function of the structures applied to the hostile work environment cause of action by the courts and the Equal Employment Opportunity Commission (EEOC). *See* Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370–71 (1993)

same would be true for employees subjected to harassment aimed at their sensitivities due to their membership in any class protected under federal anti-discrimination laws.[2] Anti-discrimination laws fail to protect these individuals from workplace harassment that affects their unusual sensitivities because the current legal framework applied to most workplace harassment claims, hostile work environment, includes an objective reasonableness standard.[3] Thus, it does not protect individuals who suffer harassment due to their membership in a protected class based on objectively unreasonable perceptions and sensitivities, even when the harasser knew of such sensitivities. This result is inconsistent with the purposes of the federal anti-discrimination statutes, which prohibit discrimination in the terms or conditions of employment based on membership in a protected class.[4]

(setting forth structure to be applied to sexual harassment claims, and recognizing actionability of hostile work environments aimed at other protected classes); EEOC Proposed Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age or Disability, 58 Fed. Reg. 51,266 (1993) (to be codified at 29 C.F.R. § 1609) (proposed Oct. 1, 1993) [hereinafter EEOC Proposed Guidelines] (setting forth a structure for analyzing gender harassment claims, as well as claims by members of other protected classes), *withdrawn*, 59 Fed. Reg. 51,396 (Oct. 11, 1994). The withdrawal of the EEOC Proposed Guidelines does not vitiate the application of the standards set forth therein to harassment based on race, national origin, religion, gender, age or disability. *See* EEOC: Enforcement Guidance on Harris v. Forklift Systems, 405 Fair Empl. Prac. Man. (BNA) 7165, 7170 (issued Mar. 8, 1994) (noting applicability of standard virtually identical to hostile work environment standard set forth in proposed guidelines on harassment based on race, religion, gender, national origin, age or disability).

[2] The hostile work environment cause of action applies to harassment aimed at classes protected under the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-17 (West 1981 & Supp. 1994) [hereinafter Title VII] (applying to race, color, religion, sex and national origin); the Americans With Disabilities Act, 42 U.S.C.A. §§ 12101–12213 (West Pamph. 1994) [hereinafter ADA] (applying to disability); the Rehabilitation Act of 1973, 29 U.S.C.A. §§ 701–797b (West 1981 & Supp. 1994) [hereinafter Rehabilitation Act] (applying to disability in context of federal employment and employers with specified relationships to federal government); and the Age Discrimination In Employment Act, 29 U.S.C.A. §§ 621–634 (West 1981 & Supp. 1994) [hereinafter ADEA] (applying to age). *See also Harris*, 114 S. Ct. at 370–71 (applying hostile work environment cause of action to sexual harassment); EEOC: Enforcement Guidance on Harris v. Forklift Systems, 405 Fair Empl. Prac. Man. (BNA) at 7170 (noting applicability of hostile work environment cause of action to claims based on conduct aimed at individuals due to their race, gender, national origin, religion, age or disability); EEOC Proposed Guidelines, *supra* note 1, 58 Fed. Reg. at 51,266 (same).

[3] The hostile work environment cause of action currently requires that alleged harassing conduct meet an objective reasonableness standard to be actionable. *See Harris*, 114 S. Ct. at 370 (applying objective reasonableness standard to hostile work environment claim). The objective reasonableness standard is meant to preclude liability for conduct that would affect only a hypersensitive employee. Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991). The impact of that standard on harassment aimed at hypersensitive employees will be discussed in more detail *infra* at part II.

[4] *See* 42 U.S.C.A. § 2000e-2(a) (West 1981 & Supp. 1994) (prohibiting discrimination in the terms or conditions of employment based on race, color, gender, religion or national origin); 42 U.S.C.A. § 12112(a) (West Pamph. 1994) (prohibiting same based on disability); 29 U.S.C.A. § 623(a) (West 1981 & Supp. 1994) (prohibiting same based on age).

Sound policy reasons support the inclusion of an objective reasonableness standard in the analytical framework applied to hostile work environment claims. Imposing liability on an employer for harassment that created a work environment hostile to any hypersensitive employee who was a member of a protected class, even when the harasser did not know of the hypersensitivity, would result in rampant and unpredictable liability for conduct that the alleged harasser could not have known would offend the victim.[5] In such cases the conduct could not be aimed at the victim due to his or her membership in a protected class, because the harasser could not know the conduct was offensive. Thus, there would be no discrimination, and it would be inappropriate to provide the victim redress under a federal anti-discrimination statute.[6]

To balance these competing concerns, an analytical framework must be developed which will provide redress to hypersensitive individuals knowingly subjected to a hostile work environment based on membership in a protected class, while protecting employers from rampant and unpredictable liability. Once such a framework is developed, the issue of the damages available to hypersensitive harassment victims must be addressed. The damages issue is relevant both to claims

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[5] The EEOC has acknowledged that the objective reasonableness standard should shield employers from liability for "petty slights suffered by the hypersensitive." *See* EEOC: Policy Guidance on Sexual Harassment, 405 Fair Empl. Prac. Man. (BNA) 6681, 6689 (issued Mar. 19, 1990); *see also Ellison*, 924 F.2d at 879 (noting that one purpose of objective reasonableness standard is to "shield employers from having to accommodate" concerns of hypersensitive employees).

[6] The statement that it would be inappropriate to provide redress to a claimant when the conduct was not aimed at that claimant due to his or her membership in a protected class, and the harasser could not have known that the conduct was offensive to the victim, applies only to harassment claims by hypersensitive employees brought pursuant to the structure set forth *infra* at part II, or a similar framework.

Conduct that is not specifically meant to discriminate based on membership in a protected class, but which has a discriminatory effect, is actionable under federal anti-discrimination laws. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 432–33, 436 (1971) (discussing the disparate impact cause of action). Likewise, conduct can create an objectively hostile work environment even when those causing the harassment do not realize that the conduct is discriminatory. *See Ellison*, 924 F.2d at 880 (conduct can be actionable harassment "even when harassers do not realize that their conduct creates a hostile working environment"). However, in this latter situation it could be argued that if conduct rises to the level necessary to create an objectively hostile work environment, the alleged harasser should realize it is discriminatory, especially if his or her employer has upheld its obligation to sensitize employees to the types of conduct that might offend a reasonable person who is a member of a protected class. *See* EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(f) (1993) (employers should "take all steps necessary to prevent" harassment including the development of "methods to sensitize all concerned"); EEOC: Policy Guidance on Sexual Harassment, 405 Fair Empl. Prac. Man. (BNA) at 6699 (discussing preventative measures in the harassment context). Failure to uphold that obligation, or to institute appropriate policies or procedures, can support employer liability for a hostile work environment. EEOC: Policy Guidance on Sexual Harassment, 405 Fair Empl. Prac. Man. (BNA) at 6697–701.

that would be brought by hypersensitive employees pursuant to this new framework, and to objectively hostile work environments.[7] This Article sets forth an analytical framework for harassment claims brought by hypersensitive employees. That framework is modeled on the treatment of hypersensitive individuals under the tort theory of intentional infliction of emotional distress.[8] This Article also discusses whether hypersensitive harassment victims who succeed on a hostile work environment claim under the framework set forth herein, or in cases involving an objectively hostile work environment, should obtain relief for the exacerbation of an unusual sensitivity.

Part I sets forth the current structure applied to hostile work environment claims, including employer liability for such claims. Part I also addresses the differences in the hostile work environment cause of action as applied to the various classes protected under federal anti-discrimination laws.

Part II discusses the treatment of hypersensitive employees under current hostile work environment analysis. Part II then sets forth a model based on the tort of intentional infliction of emotional distress, which demonstrates when and under what circumstances such individuals can be protected without imposing an undue burden on employers.

Part III addresses what damages should be available to a hypersensitive employee who is harassed based on a known hypersensitivity because of his or her membership in a protected class. It also addresses whether damages should be available for injury resulting from the exacerbation of a hypersensitivity caused by an objectively hostile work environment[9] when the harasser had no knowledge of the sensitivity. Part III discusses the applicability of the "eggshell skull" rule to such situations.[10]

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[7] The measure of damages for injury resulting from objectively hostile work environments has been addressed. Compensatory damages are available in appropriate circumstances for violations of Title VII, the ADA and the Rehabilitation Act. 42 U.S.C.A. § 1981a (West Supp. 1994). However, whether damages should be available for any exacerbation of a victim's unusual sensitivity resulting from an objectively hostile work environment has not been sufficiently addressed.

[8] *See* RESTATEMENT (SECOND) OF TORTS § 46(1) & cmt. f (1965) (providing protection to highly sensitive individuals if actor knew of individual's hypersensitivity and acted anyway). For a detailed discussion of the tort of intentional infliction of emotional distress and the treatment of hypersensitive individuals thereunder, see *infra* part II.B.

[9] The term "objectively hostile work environment" refers to a work environment that meets the objective reasonableness standard courts apply to help determine whether a work environment is actionable. That standard is discussed in detail *infra* at part I.

[10] The "eggshell skull" rule, which will be discussed in more depth *infra* at part III, allows a negligence victim to recover for injury caused by a latent condition regardless of whether the

I. THE CURRENT STRUCTURE APPLIED TO HOSTILE WORK ENVIRONMENT CLAIMS UNDER FEDERAL ANTI-DISCRIMINATION STATUTES

The hostile work environment cause of action arises when harassing conduct alters a term or condition of employment based on the victim's membership in a protected class.[11] The structure of this cause of action has been evolving since 1971 when the Fifth Circuit first recognized it in *Rogers v. EEOC*.[12] As a matter of general application, an actionable hostile work environment exists where conduct is aimed at an employee because of his or her membership in a protected class, and that conduct is sufficiently severe or pervasive to alter the terms or conditions of employment and create an abusive working environment—one which an objectively reasonable individual would perceive to be abusive, and which the victim did perceive to be abusive.[13] The conduct need not seriously affect the employee's psychological well being or cause physical symptoms or injuries.[14]

The application of this general framework to the classes protected under federal anti-discrimination law may vary,[15] but the inclusion of an objective reasonableness standard remains constant, even though

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negligent individual could have foreseen such injury. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 43, at 291–92 (5th ed. 1984).

[11] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64–65 (1986).

[12] 454 F.2d 234, 237–39 (5th Cir. 1972). *Rogers*, which involved racial discrimination aimed at a Hispanic employee, was the first case to recognize the actionability of a hostile work environment under federal anti-discrimination laws. *Id.*

[13] Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993).

[14] *Id.* at 370–71.

[15] *See Harris*, 114 S. Ct. at 370–71 (applying framework to sexual harassment claim, but refusing to address the EEOC Proposed Guidelines, which apply a slightly different framework to harassment aimed at members of other protected classes); EEOC Proposed Guidelines, *supra* note 1, 58 Fed. Reg. at 51,267 (noting that the differing nature of sexual harassment and harassment based on gender, race, color, religion, ethnicity, age or disability necessitates separate guidelines for sexual harassment claims); Frank S. Ravitch, *Beyond Reasonable Accommodation: The Availability and Structure of a Cause of Action for Workplace Harassment Under the Americans With Disabilities Act*, 15 CARDOZO L. REV. 1475 (1994) (the analytical structure applied to harassment claims brought under the ADA must account for the unique concerns relating to disability discrimination as well as the requirements of the ADA, and thus that structure will be slightly different from that applied to other protected classes). However, the variation in the application of the hostile work environment framework will generally be one of form, and not substance. *See* EEOC: Enforcement Guidance on Harris v. Forklift Systems, 405 Fair Empl. Prac. Man. (BNA) 7165, 7167–70 (issued Mar. 8, 1994) (the *Harris* opinion is consistent with the framework applied by the EEOC for determining whether a working environment is hostile to the classes protected under the federal anti-discrimination statutes, and the "reasonable person" standard applied to sexual harassment claims by the *Harris* Court should be interpreted to include consideration of the victim's perspective so as to be consistent with the standards applied by the EEOC).

the exact language used to express that standard does not.[16] The objective reasonableness standard has a clear purpose—to protect employers from complaints raised by hypersensitive employees.[17] The universal application of the objective reasonableness standard to eliminate claims based on employee hypersensitivities conflicts with the mandates of federal anti-discrimination laws,[18] and as discussed below, requires the development of an exception to the objective reasonableness standard.[19]

The issue of employer liability for a hostile work environment is also germane to the application of that cause of action to hypersensitive employees.[20] The general rules applicable to employer liability for hostile work environment claims bear on the development of any exception to the objective reasonableness requirement. These general rules also bear on the issue of the damages available to hypersensitive employees subjected to an actionable hostile work environment,[21] and to employer remedial action which could limit such damages.[22]

According to the EEOC, an employer is liable for hostile work environment harassment performed by its agents or supervisory employees when the harasser is acting in an agency capacity, or when the employer knew or should have known of the conduct and failed to take immediate and appropriate corrective action.[23] It is presumed that a supervisory employee has apparent authority, and thus is acting in an

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[16] *See Harris*, 114 S. Ct. at 370–71 (applying a reasonable person standard in the sexual harassment context); Steiner v. Showboat Operating Co., 25 F.3d 1459, 1462–64 (9th Cir. 1994) (applying test set forth in *Harris*, but utilizing reasonable woman standard, thus acknowledging that "reasonable person" language in *Harris* might indeed mean reasonable woman when victim is female); Ravitch, *supra* note 15, at 1505–09 (suggesting a reasonable person with the same disability standard for harassment aimed at disabled employees).

[17] *See supra* note 5.

[18] *See supra* note 4 and accompanying text; *see also infra* part II.

[19] That standard is set forth *supra* in part II.D.

[20] *See infra* parts II.D, III.

[21] *See infra* part III.

[22] *See infra* notes 33–36, 76–77 and accompanying text.

[23] EEOC: Policy Guidance on Sexual Harassment, 405 Fair Empl. Prac. Man. (BNA) 6695, 6699 (issued Mar. 19, 1990) (setting forth standard in sexual harassment context); *see also* EEOC Proposed Guidelines, *supra* note 1, 58 Fed. Reg. at 51,269 (applying same standard to gender, race, religion, national origin, age and disability) (withdrawn, 59 Fed. Reg. 51,396 (Oct. 11, 1994), for reasons unrelated to employer liability provisions). Although the proposed guidelines applied the same standards for employer liability for hostile work environment to all protected classes including age and disability, it is important to note that victims of age and disability discrimination are protected under different statutes, and thus in such cases the standards must be modified to meet the requirements of those statutes. *See* Ravitch, *supra* note 15, at 1504–09 (EEOC Proposed Guidelines and Title VII standards for employer liability must be altered or augmented to meet statutory requirements of ADA).

agency capacity, when the employer does not have in place a harassment policy or appropriate complaint procedures.[24] Employers are liable for the conduct of co-workers where the employer, its agents, or supervisory personnel knew or should have known of the conduct, and the employer failed to take immediate and appropriate corrective action.[25] Employers can also be liable for the acts of non-employees when the employer, its agents, or supervisory personnel, knew or should have known of the alleged conduct, and failed to take immediate and appropriate corrective action.[26]

Some confusion has arisen as a result of language contained in the EEOC Guidelines on Discrimination Because of Sex.[27] Those guidelines set forth a similar standard for determining employer liability for harassment,[28] with an important exception: the sexual harassment guidelines suggest that employers are strictly liable for the acts of supervisors and agents.[29] However, in *Meritor Savings Bank, FSB v. Vinson*, the Supreme Court indicated that general agency principles should be applied in sexual harassment cases to determine employer liability for supervisory actions.[30] Courts have followed the Supreme Court's advice, and have looked to agency principles to determine such liability.[31] Likewise, as demonstrated by the standard set forth in EEOC Policy Guidance, the EEOC has backed away from its initial stance regarding strict employer liability for the acts of supervisors.[32]

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[24] EEOC: Policy Guidance on Sexual Harassment, 405 Fair Empl. Prac. Man. (BNA) at 6697–98; EEOC Proposed Guidelines, *supra* note 1, 58 Fed. Reg. at 51,269.

[25] Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1422 (7th Cir. 1986); EEOC: Policy Guidance on Sexual Harassment, 405 Fair Empl. Prac. Man. (BNA) at 6695.

[26] Magnuson v. Peak Technical Servs., Inc., 808 F. Supp. 500 (E.D. Va. 1992); EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(e) (1993); EEOC Proposed Guidelines, *supra* note 1, 58 Fed. Reg. at 51,269.

[27] EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1993).

[28] *Id.* § 1604.11(c)–(e).

[29] *Id.* § 1604.11(c).

[30] 477 U.S. 57, 69–73 (1986).

[31] *See, e.g.*, Ellison v. Brady, 924 F.2d 872, 881–83 (9th Cir. 1991); Andrews v. City of Philadelphia, 895 F.2d 1469, 1486 (3d Cir. 1990); Hall v. Gus Constr. Co., 842 F.2d 1010, 1015–16 (8th Cir. 1988).

[32] In 1990, the EEOC issued policy guidance in regard to sexual harassment claims. That guidance expressly incorporates agency principles into its analysis of employer liability for supervisory actions that contribute to or create a hostile work environment. EEOC: Policy Guidance on Sexual Harassment, 405 Fair Empl. Prac. Man. (BNA) 6681, 6693–99 (issued Mar. 19, 1990); *see also supra* notes 23–26 and accompanying text. Factors to be considered in determining employer liability include: (1) whether the employer knew or should have known of the supervisor's harassing conduct; and (2) whether a supervisory employee had "apparent authority." EEOC: Policy Guidance on Sexual Harassment, 405 Fair Empl. Prac. Man. (BNA) at 6693–99.

The EEOC also provides guidance regarding measures an employer can take to help avoid liability and eliminate harassment.[33] Employers should take all steps necessary to prevent harassment, such as affirmatively raising the subject, expressing strong disapproval, providing sensitivity training and implementing and disseminating appropriate harassment policies, sanctions and complaint procedures.[34] Some courts have addressed the adequacy of employer remedial action,[35] while other courts have addressed the adequacy of employer harassment policies.[36]

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[33] *See, e.g.*, EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. at § 1604.11(d) and (f); EEOC: Policy Guidance on Sexual Harassment, 405 Fair Empl. Prac. Man. (BNA) at 6697–701. Additionally, case law has addressed this issue. *See, e.g., Ellison*, 924 F.2d at 881–83; Giandano v. William Patterson College, 804 F. Supp. 637, 643–44 (D.N.J. 1992); United States v. City of Buffalo, 457 F. Supp. 612, 632–35 (W.D.N.Y. 1978), *modified in part*, 633 F.2d 643 (2d Cir. 1980).

[34] *See* EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. at § 1609.2(d) and (f); EEOC: Policy Guidance on Sexual Harassment, 405 Fair Empl. Prac. Man. (BNA) at 6697–701.

[35] For example, in *Barrett v. Omaha National Bank*, the court held that a full investigation of a complaint of harassment, followed by a reprimand and the placement of the harasser on ninety-day probation with a warning that further misconduct would result in discharge, was sufficient to remedy a hostile work environment. 726 F.2d 424, 427–28 (8th Cir. 1984). In *Katz v. Dole*, the court held that an employer may avoid liability if it takes steps "reasonably calculated to end the harassment," and that the employer in that case took sufficient action to avoid vicarious liability by fully investigating the allegations, issuing written warnings to stop discriminatory conduct, and telling the harasser that a subsequent act of harassment would result in suspension. 709 F.2d 251, 256 (4th Cir. 1983).

More generalized criteria for evaluating the appropriateness of employer remedial actions were set forth in *Ellison*, 924 F.2d at 882. Despite the fact that there was insufficient evidence in Ellison's case to determine whether the employer's response was sufficient to avoid vicarious liability, the court clarified the standards for determining such liability generally. *Id.* at 882–83. First, not all harassment warrants dismissal of the harasser. *Id.* at 882. Second, employer remedial action should be assessed proportionately to the seriousness of the offense. *Id.* (citing Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 309 (5th Cir. 1987)). Third, an employer should impose penalties sufficient "to assure a workplace free from" harassment. *Id.* Fourth, it would be inappropriate to transfer a victim of harassment out of a work environment in an attempt to stop the harassment, because that would punish the victim for the harasser's conduct. *Id.* In addition, the court noted that "Title VII requires more than a mere request" that the harasser refrain from discriminatory conduct, and that unless an employer disciplines harassers, that employer sends "the wrong message to potential harassers." *Id.* The court concisely stated the essence of the criterion for determining the appropriateness of an employer's remedial action as follows:

> Employers should impose sufficient penalties to assure a workplace free from sexual harassment. In essence, then, we think that the reasonableness of an employer's remedy will depend on its ability to stop harassment by the person who engaged in harassment. In evaluating the adequacy of the remedy, the court may also take into account the remedy's ability to persuade potential harassers to refrain from unlawful conduct.

Id.

[36] *See, e.g.*, Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1510–12, 1517–19, 1537–38, 1541–46 (M.D. Fla. 1991) (holding that sexual harassment policies implemented by

II. THE HYPERSENSITIVE EMPLOYEE AND THE OBJECTIVE REASONABLENESS STANDARD: REMEDYING A SHORTCOMING IN THE ANALYSIS OF HARASSMENT CLAIMS

A. *Hypersensitive Employees Are Not Currently Protected Under the Hostile Work Environment Cause of Action*

The objective reasonableness standard applicable to all hostile work environment claims is meant to protect employers from liability for conduct that would only offend a hypersensitive employee.[37] A natural corollary of including an objective reasonableness standard in the test applied to hostile work environment claims is that hypersensitive employees are not protected from conduct that they perceive as hostile or abusive based on their membership in a protected class, to the extent that those perceptions are based on the hypersensitivity.[38] At first glance this seems a logical rule which should be applied universally.

However, if an employer could avoid liability for harassment inflicted on a hypersensitive employee, which is intentionally aimed at the hypersensitivity, hypersensitive individuals could legally be harassed based on known, although objectively unreasonable, sensitivities without redress.[39] When such harassment is aimed at an individual because of his or her membership in a protected class, or involves sexual conduct, the employer would escape liability under federal anti-discrimination statutes, even when the victim's terms or conditions of employment were altered based on impermissible criteria. In such a

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employer were inadequate, and providing injunctive relief including order that employer implement appropriate sexual harassment policy as set forth by court in Appendix to decision).

[37] In discussing the objective reasonableness standard applicable to hostile work environment claims, the court in *Ellison* held:

> In order to shield employers from having to accommodate the idiosyncratic concerns of the rare hyper-sensitive employee, we hold that a female plaintiff states a prima facie case of hostile work environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.

924 F.2d at 879 (footnotes omitted).

[38] *Id.*

[39] If the sensitivity constituted a disability under the test set forth in the ADA or Rehabilitation Act, the harassment could be actionable as disability-based harassment. *See, e.g.*, Ravitch, *supra* note 15, at 1475. However, the implication of the term "hypersensitivity" is that it refers to an objectively unreasonable sensitivity not necessarily associated with a mental disability. Otherwise, the specific disorder itself would be referred to (for example, paranoia, neurosis, etc.). Of course, to the extent that a disability does make an individual overly sensitive, one suffering from an unusual sensitivity related to a disability might be considered "hypersensitive."

situation, the victim would not recover damages or secure injunctive relief unless he or she could prove a common law tort claim, such as intentional infliction of emotional distress, which is a much more onerous burden than proving hostile work environment.[40]

Such a result is inconsistent with the federal anti-discrimination statutes' prohibition against discrimination in the terms or conditions of employment based on membership in a protected class,[41] which are meant "to strike at all" disparate treatment of men and women in employment.[42] It is also inconsistent with the underlying basis for the hostile work environment cause of action: preventing the alteration of a term or condition of employment by harassing conduct based on an employee's membership in a protected class.[43]

Conversely, holding employers or their agents liable for conduct that they did not know would offend a hypersensitive employee, or which was not based on that employee's membership in a protected class, would not further the goals of the federal anti-discrimination statutes because such conduct would not discriminate on the basis of the hypersensitive employee's membership in a protected class.[44] Additionally, the imposition of such liability would place an undue burden on employers and alleged harassers, because they would never know what conduct might constitute actionable harassment, and as a result, would not know how to prevent such conduct from occurring.

Thus, any modification of the hostile work environment test to allow consideration of conduct aimed at an employee's hypersensitivity in appropriate situations must be carefully drawn to balance these competing interests. It is useful to look at the tort of intentional infliction of emotional distress, which specifically addresses hypersensitive individuals, in considering what, if any, modifications are appropriate.[45]

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[40] Nicolle R. Lipper, Comment, *Sexual Harassment in the Workplace: A Comparative Study of Great Britain and the United States*, 13 COMP. LAB. L.J. 293, 300–01 (1992).

[41] *See supra* note 4.

[42] Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993) (referring to Title VII's prohibition on interference with terms or conditions of employment).

[43] *Id.* at 370–71.

[44] The federal anti-discrimination statutes relating to employment discrimination prohibit employers from discriminating against employees because of their membership in a protected class. *See supra* note 4. In the absence of such discrimination the protections accorded under those statutes are inapplicable. If conduct alleged by a hypersensitive employee in relation to a harassment claim would not have created a hostile work environment for a reasonable person of the alleged victim's class, and the alleged harasser had no way of knowing that the conduct would offend the alleged victim, there would be no basis for finding discrimination based on membership in a protected class. *See supra* notes 5–6 and accompanying text.

[45] *See supra* note 8; *infra* part II.B.

B. *Intentional Infliction of Emotional Distress*

Intentional infliction of emotional distress or "outrage," as it is sometimes called, is a common law tort theory which has gained acceptance in many jurisdictions since the introduction of the *Restatement (Second) of Torts*.[46] The tort requires the intentional or reckless infliction of severe emotional distress on an individual by extreme and outrageous conduct.[47] For conduct to be extreme and outrageous it must go "beyond all possible bounds of decency, and [must] be regarded as atrocious, and utterly intolerable in a civilized community."[48] Conduct can be intentional or reckless when the actor desires to inflict severe emotional distress, knows severe emotional distress is substantially certain to result from the conduct, or acts recklessly in deliberate disregard of a high degree of probability that severe emotional distress will follow.[49] Furthermore, emotional distress is only severe enough to qualify under this theory when "the distress inflicted is so severe that no reasonable man could be expected to endure it."[50] In this regard, the intensity and duration of the distress are among the factors a court should consider.[51]

The tort of intentional infliction of emotional distress allows for consideration of a victim's hypersensitivity when the person inflicting the emotional distress knows of the hypersensitivity, but acts anyway.[52] Comment f to the *Restatement (Second) of Torts* provides:

> The extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity. The conduct may become heartless, flagrant, and outrageous when the actor proceeds in the face of such knowledge, where it would not be so if he did not know. It must be emphasized again, however, that major outrage is essential to the tort; and the mere fact that

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[46] RESTATEMENT (SECOND) OF TORTS § 46 (1965).

[47] The RESTATEMENT (SECOND) OF TORTS § 46(1) states: "(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."

[48] *Id.* at cmt. d.

[49] *Id.* at cmt. i.

[50] *Id.* at cmt. j.

[51] *Id.*

[52] RESTATEMENT (SECOND) OF TORTS § 46(1) cmt. f.

> the actor knows that the other will regard the conduct as insulting, or will have his feelings hurt, is not enough.[53]

Courts upholding claims based on comment f have not required that the victim have a clinically recognized mental or physical condition, but rather have focused on whether the defendant acted in the face of knowledge that the victim had a peculiar sensitivity.[54] The conduct must also meet all the other requirements of intentional infliction of emotional distress to be actionable.[55] Courts have found actionable conduct knowingly aimed at sensitivities such as sensitivity about being photographed,[56] sensitivity in regard to financial concerns,[57] sensitivity engendered by a particular racial slur,[58] and sensitivities related to recovery from a calamity.[59]

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[53] *Id.* Interestingly, the tort of offensive battery requires that conduct "be offensive to a reasonable sense of personal dignity," not simply to one who is "unduly sensitive as to his personal dignity." *See id.* § 19 cmt. a. The Restatement contains a caveat that reads as follows: "The institute expresses no opinion as to whether the actor is liable if he inflicts upon another a contact which he knows will be offensive to another's known but abnormally acute sense of personal dignity." *Id.* at caveat to § 19. Thus, while the Restatement structure for the tort of offensive battery specifically precludes claims by hypersensitive individuals when the offensiveness of the battery was caused by the hypersensitivity, it does recognize the possibility that if the actor knows of the hypersensitivity and acts to offend it, the actor may be liable.

How this concept should be applied will depend on how the courts of a given jurisdiction interpret the tort of offensive battery. One possible basis for treating hypersensitive individuals differently under offensive battery than under intentional infliction of emotional distress, despite the caveat, is the concept of justification. One might be justified in causing a seemingly benign contact that one knows will be offensive to another simply due to the other person's unusual sensitivity. On the other hand, the nature of the conduct required for intentional infliction of emotional distress precludes a justification defense because the required conduct is inherently unjustified. *See supra* notes 47–49 and accompanying text (setting forth the nature of conduct that will support a claim for intentional infliction of emotional distress). The same is true for hostile work environment because conduct that rises to the level of creating a hostile work environment could be considered inherently unjustified. *See supra* part I (discussing the level of conduct necessary to create a hostile work environment).

[54] *See, e.g.*, Muratore v. M/S Scotia Prince, 656 F. Supp. 471, 480–81 (D. Me. 1987); Simmons v. Prudential Ins. Co. of Am., 641 F. Supp. 675, 683–84 (D. Colo. 1986); *see also* Alcorn v. Anbro Eng'g, Inc., 468 P.2d 216, 218 (Cal. 1970) (reversing dismissal of claim based on racial slurs, in part because defendants were aware of plaintiff's "particular susceptibility to emotional distress").

[55] *See Alcorn*, 468 P.2d at 218–19. These requirements are a function of state law, which generally relies on the RESTATEMENT (SECOND) OF TORTS. *Id.*

[56] *Muratore*, 656 F. Supp. at 480–81.

[57] Symonds v. Mercury Sav. & Loan Ass'n, 275 Cal. Rptr. 871, 878 (Cal. Ct. App. 1990).

[58] *See, e.g., Alcorn*, 468 P.2d at 218–19; Dawson v. Zayre Dept. Stores, 499 A.2d 648, 651–53 (Pa. Super. Ct. 1985) (Olszewski, J., dissenting). *But see Dawson*, 499 A.2d at 649–50 (majority holding that racial slur is not sufficiently outrageous to create liability for intentional infliction of emotional distress); Lay v. Roux Lab., Inc., 379 So. 2d 451, 452–53 (Fla. Dist. Ct. App. 1980) (same).

[59] *See* Simmons v. Prudential Ins. Co. of Am., 641 F. Supp. 675, 683–84 (D. Colo. 1986) (case involving actions by insurance company toward insured while insured, who recently underwent a calamity, was in therapy).

C. *Lessons Learned from the Treatment of Hypersensitive Individuals Under the Theory of Intentional Infliction of Emotional Distress*

A standard, like the intentional infliction of emotional distress standard, which provides relief to individuals who are subjected to harmful conduct based on a sensitivity known to the actor which causes those individuals severe emotional distress, evinces a distinct logic.[60] Inflicting conduct that most people would not find distressing, with the knowledge that the victim will find it extremely distressing, is flagrant, heartless and outrageous, and thus should be a basis for relief.[61] This is so because no real difference distinguishes inflicting extreme and outrageous conduct that one knows would cause severe emotional distress in most people, and inflicting conduct that one knows will have the same effect on a hypersensitive individual.[62]

From a practical standpoint, the intentional infliction of emotional distress standard allows hypersensitive individuals to obtain redress for distress caused them in relation to a hypersensitivity only when the actor knew of the hypersensitivity and acted anyway.[63] This avoids the problem of rampant and unpredictable liability, while preventing a would-be inflictor of distress from hiding behind the victim's hypersensitivity when she utilizes that hypersensitivity as a mechanism for inflicting harm on the victim.[64] The tort standard punishes the actor for conduct that would otherwise meet the requirements for intentional infliction of emotional distress, while protecting from liability individuals whose actions do not meet the necessary level of culpability.[65] Thus, the standard provides an excellent model for a modification to the hostile work environment cause of action.

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[60] For a discussion of this rule, see *supra* part II.B.

[61] Pursuant to the RESTATEMENT (SECOND) OF TORTS § 46 cmt. f, such flagrant, heartless and outrageous conduct is actionable under the tort of intentional infliction of emotional distress.

[62] This is particularly so, because intent to cause the victim emotional distress is a key element of the tort. *See supra* notes 49, 53 and accompanying text (discussing the intent requirement). Thus, when one acts knowingly to inflict extreme emotional distress, it makes no difference whether that distress is inflicted on the victim due to a known hypersensitivity or due to knowledge that the conduct would so distress most people. Under either circumstance, if the other requirements for the cause of action are met, liability should attach. RESTATEMENT (SECOND) OF TORTS § 46 cmt. f.

[63] The fact that the actor proceeded in the face of a known hypersensitivity is the basis for the protection provided to hypersensitive individuals under the tort of intentional infliction of emotional distress. RESTATEMENT (SECOND) OF TORTS § 46 cmt. f.

[64] See *infra* part III for a discussion of the concerns regarding rampant and unpredictable liability which could result from providing redress to all hypersensitive individuals harmed in relation to their hypersensitivity.

[65] This may provide little solace to a hypersensitive individual who is harmed by unknowing

Further support for applying the intentional infliction of emotional distress rule regarding hypersensitive individuals to hostile work environment derives from the similarity between those theories. Both focus in part on the intent or recklessness of the perpetrator; intentional infliction of emotional distress focuses on the intentional or reckless infliction of severe emotional distress on an individual,[66] and hostile work environment focuses on the harassment of an employee or employees because of membership in a protected class.[67] In fact, prior to the establishment of the hostile work environment cause of action, victims of workplace harassment often had to rely on intentional infliction of emotional distress to obtain relief.[68]

D. *Providing a Workable Framework to Protect Hypersensitive Employees*

To allow an employer to escape liability for conduct aimed at an employee because of his or her membership in a protected class simply because the harasser knows that the victim has an unusual sensitivity and aims the conduct at that sensitivity would violate the prohibition of

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conduct. However, the requirement that the actor have knowledge of the sensitivity giving rise to emotional distress is necessary to avoid unpredictable and rampant liability being imposed on individuals who had no intention to inflict emotional distress. Moreover, even if such intent were not required, it would likely strain the bounds of negligence law to argue that an individual who had no knowledge of another's peculiar sensitivity, and acted in a manner which reasonable people would not expect to present a risk of causing distress, should be held liable for his or her actions. *See* RESTATEMENT (SECOND) OF TORTS § 313 (1965) (applying to negligent infliction of emotional distress, and noting that actions causing unintentional emotional distress are not actionable unless the actor should have realized his or her conduct involved an unreasonable risk of causing the distress). For a summary of general negligence law and concerns regarding the concept of foreseeability, see Leon Green, Note, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401 (1961).

[66] *See supra* part II.B.

[67] Significantly, in the context of an objectively hostile work environment, the harasser need not intend to discriminate or create a hostile work environment so long as an objectively reasonable person would perceive the conduct to create such an environment. Ellison v. Brady, 924 F.2d 872, 880 (9th Cir. 1991). If the conduct rises to the level necessary to create a hostile work environment, it is arguably action which the harasser is substantially certain will upset the victim, or which was undertaken in deliberate disregard of a high degree of probability that a hostile work environment would be created for the victim—the required standard for proving recklessness under intentional infliction of emotional distress. *See supra* note 49 and accompanying text. However, a hostile work environment victim need not meet this intentional infliction of emotional distress standard, or the other strict standards required to prove that tort. For example, in the hostile work environment context the discriminatory conduct need not cause the level of severe emotional distress required to prove intentional infliction of emotional distress, *see supra* note 50 and accompanying text, it need only cause the complainant to perceive the working environment as abusive. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370–71 (1993).

[68] Lipper, *supra* note 40, at 300–01. However, it was hard to prevail on such claims because of the onerous standard applied to claims of intentional infliction of emotional distress. *Id.*

discrimination in the terms or conditions of employment contained in the federal anti-discrimination statutes.[69] However, it would be equally against the spirit of the federal anti-discrimination statutes to hold an employer liable for conduct which a hypersensitive employee believes altered a condition of his or her employment and created an abusive work environment, if an objectively reasonable person would not have found that to be so, and the alleged harasser could not have known that his or her conduct would offend the victim's unique sensitivity.[70] Fortunately, the treatment of hypersensitive employees under the tort of intentional infliction of emotional distress provides the basis for a model which can balance these concerns, and which can be applied consistently with the mandates of the federal anti-discrimination laws.

Thus, I propose a simple exception to the objective reasonableness standard currently applied under the hostile work environment theory. The test for hostile work environment as modified by this exception would provide that when: (1) the harasser knows of the unusual sensitivities of the complainant; (2) the harassment is aimed at those sensitivities; (3) the harassment is aimed at the complainant because of his or her membership in a protected class; (4) the conduct is sufficiently severe or pervasive to alter a term or condition of the complainant's employment and create a hostile or abusive working environment;[71] and (5) the complainant subjectively perceived the conduct to have created such an environment, liability for the creation and maintenance of a hostile work environment can attach. Whether or not the harasser had knowledge of the sensitivity should be determined in accordance with the *Restatement (Second) of Torts* § 46, comment f, and cases interpreting that comment.[72]

To establish employer liability for such harassment, the victim would have to demonstrate that the employer had actual or constructive knowledge of the particular sensitivity or sensitivities involved, and that the victim was being harassed in regard to such sensitivity or sensitivities,[73] or that the harasser had apparent authority to act on

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[69] *See supra* note 4 and accompanying text; *supra* parts I, II.A.

[70] *See supra* note 6.

[71] The term "complainant's employment" is used to demonstrate that, once steps one through three are proven, conduct is actionable if someone with complainant's sensitivities would find it sufficiently severe or pervasive to alter a term or condition of employment and create a hostile or abusive working environment.

[72] For the full text of comment f, see *supra* note 53 and accompanying text.

[73] This requirement is included because employers could not take appropriate remedial action if they were unaware that the alleged conduct was affecting a hypersensitive employee, and it would be impossible for employers to foresee and prevent harassment aimed at every possible unique sensitivity employees could possess. However, as will be addressed below, if this exception

behalf of the employer.[74] If one of these grounds for employer liability can be demonstrated, liability for the acts of co-employees, supervisors and agents would be based on the same factors as in other hostile work environment claims.[75]

Under the framework generally applicable to the hostile work environment cause of action, an employer can limit liability if it takes appropriate remedial action and has an adequate harassment policy in place.[76] Conversely, as noted above, an employer can be held liable for a hostile work environment where its remedial action or harassment policy is inadequate.[77] This principle should be extended to employer liability for a hostile work environment actionable under the framework set forth herein. Thus, it would be advisable for employers to address this issue in their harassment policies.[78]

The central requirements of the model set forth above are that the victim can demonstrate the harasser both knew of the hypersensi-

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to the objective reasonableness standard is recognized by the courts or legislature, employers should include a provision in harassment policies addressing the issue. *See infra* note 78 and accompanying text. Otherwise, their harassment policies might be deemed inadequate, and they could be held liable whether or not they had knowledge of an employee's sensitivity, because inadequate harassment policies can be grounds for vicarious employer liability, even when upper-management does not have knowledge of the harassment giving rise to a claim. *See* EEOC: Policy Guidance on Sexual Harassment, 405 Fair Empl. Prac. Man. (BNA) 6681, 6697–99 (issued Mar. 19, 1990) (employers should have in place an effective harassment policy and complaint procedure; the absence of "a strong, widely disseminated, and consistently enforced" harassment policy, and "an effective complaint procedure," can clothe harassing conduct by supervisory employees with apparent authority thus leading to vicarious employer liability); *see also* EEOC v. Hacienda Hotel, 881 F.2d 1504, 1516 (9th Cir. 1989) (holding that employer's policy against discrimination and internal grievance procedure were inadequate to shield employer from liability for sexual harassment in absence of policy specifically addressing such harassment and providing appropriate complaint procedures); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1510–12, 1517–19, 1537–38, 1541–46 (M.D. Fla. 1991) (holding that employer's harassment policies were inadequate, and noting that "gap" in employer's original policy "left higher management unaware" of some incidents of harassment).

[74] Apparent authority is an agency principle, which, in the harassment context, provides a basis for employer liability for conduct by supervisory employees in the absence of actual or constructive knowledge. *See* EEOC: Policy Guidance on Sexual Harassment, 405 Fair Empl. Prac. Man. (BNA) at 6697–98. Such liability can arise in the absence of an appropriate harassment policy or complaint procedure. *Id.*

[75] *See supra* part I.

[76] *See* EEOC: Policy Guidance on Sexual Harassment, 405 Fair Empl. Prac. Man. (BNA) at 6697–99 (an employer can "divest its supervisors of . . . apparent authority"—which can support vicarious employer liability—by implementing and maintaining an effective harassment policy and complaint procedure).

[77] *See supra* note 74. Of course, for liability to be imposed, the other requirements for proving a hostile work environment would have to be proven. *See supra* part I.

[78] As with other claims of workplace harassment, if the employer has adequate policies and procedures in place, and takes immediate and appropriate remedial action upon learning of the harassment, the employer might avoid liability. *See supra* notes 34–36, 74 and accompanying text.

tivity and acted in a manner which exacerbated that sensitivity because of the victim's membership in a protected class, thereby altering a term or condition of the victim's employment. However, the conduct, and thus the sensitivity, need not be directly related to a trait attributed to the protected class, so long as the victim would not have been subjected to the harassment "but for" his or her membership in the protected class.[79]

III. "EGGSHELL SKULL" HARASSMENT VICTIMS: DETERMINING DAMAGES FOR THE HYPERSENSITIVE HOSTILE WORK ENVIRONMENT VICTIM

The development of the framework set forth in Part II raises an important question—whether employees who prevail under that framework should obtain redress for injury caused due to the exacerbation of their hypersensitivities. The answer to this question is significant because it implicates a second question, namely, whether individuals should obtain redress for injury relating to a hypersensitivity, when that injury is caused by an objectively hostile work environment[80] and the harasser did not know of the individual's sensitivity. Once again, tort law is instructive.

The "eggshell skull" rule requires the imposition of liability for injury resulting from negligent actions which exacerbate a unique physical or emotional weakness or sensitivity of an injured party.[81] Thus, the actor is liable for injury to a victim when his or her negligence "operates upon a concealed physical condition . . . a latent disease, or susceptibility to disease," regardless of whether the actor could have anticipated such injury.[82] Significantly, the "eggshell skull" rule has been applied to latent mental disorders, which might be implicated in the hostile work environment context, such as a neurotic disposition.[83]

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[79] *See, e.g.*, Delgado v. Lehman, 665 F. Supp. 460, 467–68 (E.D. Va. 1987) (noting actionability of conduct aimed at individual because of her gender, but which was otherwise unrelated to gender).

[80] In such a situation the issue would simply relate to damages since a work environment which is reasonably perceived to be hostile could be actionable regardless of the construct proposed in this Article.

[81] KEETON ET AL., *supra* note 10, § 43, at 291–92.

[82] *Id.*

[83] Alexander v. Knight, 177 A.2d 142, 147–48 (Pa. Super. Ct. 1962). In *Alexander*, the appellate court overturned an inadequate jury verdict in a case involving an automobile accident victim whose neurotic disposition prolonged her recovery, because the jury did not appropriately consider her injuries. *Id.* at 147. The court held that "[a] defendant is not relieved of responsibility because his victim is of a neurotic predisposition." *Id.*

The logic underlying the rule is essentially that one should take a victim as one finds him.[84] The rule functions to expand the damage for which a negligent individual is liable when the victim suffers from a latent condition or susceptibility to such a condition.[85] In such circumstances, the harm to the victim's unusual condition is not relevant until the defendant's negligence is established, and the actor need not have prior knowledge of the condition.[86] It makes sense to apply this concept to injury resulting from the kind of behavior generally involved in a hostile work environment.

This conclusion is bolstered by the law applicable to intentional infliction of emotional distress, which makes the actor liable when he or she causes severe emotional distress: "for such emotional distress, and if bodily harm to the [victim] results from it, for such bodily harm."[87] Thus, if a victim can make out a claim for intentional infliction of emotional distress, the actor is liable for all the resulting harm, whether emotional or physical.[88] The requirement that the actor have knowledge of a victim's hypersensitivity[89] is only relevant to determining whether conduct affecting such a sensitivity was extreme or outrageous enough to create liability for the tort. It does not preclude redress for injury caused by objectively reasonable emotional distress that exacerbates a latent sensitivity.[90] Likewise, when the actor proceeds despite knowledge of the victim's peculiar sensitivity, he or she is liable for all injury resulting therefrom.[91]

In the context of harassment intentionally aimed at an individual's hypersensitivity because of that individual's membership in a protected class, it makes sense to provide redress for injury that relates to the hypersensitivity, even when the actor could not have predicted the extent of that injury.[92] Such injury is a logical result of subjecting an individual with an unusual sensitivity to a situation so upsetting and

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[84] KEETON ET AL., *supra* note 10, § 43, at 291–92.

[85] *Id.*

[86] *Id.*

[87] RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).

[88] *Id.* § 46(1) & cmts. b, k.

[89] *Id.* at cmt. f.

[90] *See supra* notes 87–88 and accompanying text.

[91] Comment f to § 46 must be applied in light of the mandate of § 46(1) of the Restatement, which, as discussed above, provides redress for all injury resulting from an actionable claim of intentional infliction of emotional distress. *See* RESTATEMENT (SECOND) OF TORTS § 46(1) & cmt. f; *see also supra* notes 88–89 and accompanying text.

[92] Of course, the victim should also have a remedy for injury arising from a hostile work environment which is unrelated to the hypersensitivity, if such injury can be proven. The term "injury," as used here, refers to physical harm, emotional harm or job detriment.

harmful that it created an abusive working environment. Thus, the "eggshell skull" rule can be applied to successful claims brought pursuant to the model set forth in Part II.

A tougher question is posed by the application of the "eggshell skull" rule to hypersensitive employees subjected to an objectively hostile work environment. To address this question, we must determine whether prior knowledge of the hypersensitivity, which is required to establish liability for harassment under the model set forth in this Article,[93] should be required to impose damages for injury arising from a hypersensitivity affected by an objectively hostile work environment.

From a policy standpoint this poses a difficult question. On the one hand, it makes good sense to impose liability for all injury caused by harassing conduct, and compensatory and punitive damages, though capped, are now available under several federal anti-discrimination statutes.[94] On the other hand, the generally subjective nature of the injuries caused by workplace harassment would enable victims to obtain a windfall if they can demonstrate any unusual sensitivity that could have been exacerbated by the harassment. Moreover, the nature of employer liability for hostile work environment might make employers liable to pay such windfalls based on constructive knowledge of the harassment, even in the absence of direct knowledge of the sensitivity.[95] Under the "eggshell skull" rule, lack of knowledge of the sensitivity would be no defense to the imposition of damages.[96]

The law developed to date under the federal anti-discrimination statutes provides little clarity on this issue. The damages provisions of the Civil Rights Act of 1991 do not address the issue.[97] It is clear that the objective reasonableness standard utilized by courts in analyzing hostile work environment claims is meant to protect employers from being liable for conduct which offends a hypersensitive individual when the alleged harasser had no knowledge of the sensitivity.[98] How-

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[93] *See supra* part II.D.

[94] *See* 42 U.S.C.A. § 1981a (West Supp. 1994) (codification of the Civil Rights Act of 1991 damage provisions applicable to Title VII, the ADA and the Rehabilitation Act, which allow for compensatory and punitive damages under specified circumstances, and set forth caps for such damages based on the size of the employer involved). Section 1981a does not apply to the ADEA.

[95] *See supra* notes 20–36 and accompanying text (setting forth the test for employer liability for hostile work environment harassment).

[96] *See supra* note 86 and accompanying text.

[97] 42 U.S.C.A. § 1981a.

[98] *Id.*; *see also* Andrews v. City of Philadelphia, 895 F.2d 1469, 1483 (3d Cir. 1990) ("the objective standard protects the employer from the 'hypersensitive' employee"); EEOC Policy Guidance on Sexual Harassment, 405 Fair Empl. Prac. Man. (BNA) 6681, 6689 (issued Mar. 19, 1990) (a work environment is not hostile unless an objectively reasonable person would so perceive it; "the hypersensitive" should not be protected from "petty slights").

ever, this does not answer the question of whether the employer should be liable for injury related to an unknown hypersensitivity which was caused by an objectively hostile work environment.

The federal anti-discrimination statutes, as amended by the Civil Rights Act of 1991, evince an intent to make plaintiffs whole for any emotional distress they suffer as a result of intentional discrimination.[99] However, the specter of rampant and unpredictable liability might arise from the recognition of damage claims based on the exacerbation of hypersensitivities due to a hostile work environment. Congress has addressed concerns about rampant employer liability based on subjective claims of emotional distress by placing caps on the damages available for such distress.[100] Therefore, the federal anti-discrimination legislation evinces the conflict between the provision of appropriate remedies to the victims of discrimination and the avoidance of unpredictable liability.

In balancing these concerns in the context of hypersensitivities exacerbated by an objectively hostile work environment, one must consider the congressional mandate that individuals should not be subjected to discrimination in the terms and conditions of employment.[101] Likewise, one must consider the underlying purpose of the damages provisions of the Civil Rights Act of 1991— to provide redress for the damage caused by discrimination when it occurs, and to deter discriminatory conduct through exemplary damages.[102]

Considering these statutory mandates, as well as the competing policies and concerns, it is appropriate to provide a remedy for injuries resulting from a hypersensitivity that is exacerbated by an objectively hostile work environment. In so concluding, one cannot ignore the fact that the concerns regarding rampant and unpredictable liability are substantially curbed by the caps on damages available under the federal anti-discrimination statutes,[103] and the fact that injured employees must still make the appropriate showing to prove vicarious employer liability.[104] Nor can one ignore the continued viability of the

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[99] The Civil Rights Act of 1991 added compensatory and punitive damages to the remedies available under Title VII, the ADA and the Rehabilitation Act. *See* 42 U.S.C.A. § 1981a.

[100] *See supra* note 94.

[101] 42 U.S.C.A. § 2000e-2(a)(1) (West 1981 & Supp. 1994).

[102] *See* 42 U.S.C.A. § 1981a.

[103] *Id.* However, even in the absence of the caps on damages, I would have come to the same conclusion. The other interests supporting the application of the "eggshell skull" rule to damages resulting from a hostile work environment would still be compelling.

[104] *See supra* parts I, II.D.

defenses generally available in regard to hostile work environment liability.[105]

Therefore, employers should be liable for the injury caused by an objectively hostile work environment, even where the extent of that injury could not be foreseen due to a latent condition of the victim. Of course, the victim must still prove the existence of the alleged sensitivity.[106] The considerable body of caselaw developed under the "eggshell skull" rule will inform the application of that rule to conditions or sensitivities exacerbated by an objectively hostile work environment.[107]

IV. CONCLUSION

As the law applicable to workplace harassment develops, new issues are bound to arise. This is particularly true in regard to the hostile work environment cause of action. It is essential to address these emerging issues thoughtfully, according appropriate consideration to the policies underlying the hostile work environment cause of action, and the statutory provisions upon which it is based.

The objective reasonableness requirement of the hostile work environment cause of action raises one such issue, because it universally requires the denial of relief to hypersensitive employees when the work environments upon which their claims are based are not objectively hostile.[108] This is so even when an alleged harasser has knowledge of an employee's unusual sensitivity and acts based on a discriminatory motive.[109]

This blanket prohibition of relief violates the mandates of the anti-discrimination laws that give rise to hostile work environment.[110] Circumstances may arise where a work environment perceived by a hypersensitive employee as hostile, but which is not objectively hostile, should be actionable because it is created or perpetuated based on the

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[105] *See supra* part I.

[106] This is a logical requirement. Without it, anyone who successfully proves an objectively hostile work environment could testify or introduce other evidence that they suffered serious emotional harm or other injury as the result of an unusual sensitivity affected by the harassment, without ever having to prove the existence of such harm or injury. This is not a concern if the hostile work environment is based on exacerbation of a hypersensitivity under the framework set forth herein, because in such a case the existence of the sensitivity will have already been established in proving the existence of the hostile work environment.

[107] *See supra* notes 81–84 and accompanying text.

[108] *See supra* part II.A.

[109] *See supra* part II.A.

[110] *See supra* part II.A.

employee's membership in a protected class. This Article has created an exception to the objective reasonableness requirement, which balances the need to provide redress to hypersensitive employees in appropriate situations with policy concerns regarding rampant and unpredictable employer liability, by developing a model based on the tort of intentional infliction of emotional distress. That model limits liability to knowing harassment of hypersensitive employees due to their membership in a protected class.[111] Such an exception to the objective reasonableness standard will further the goals of the federal anti-discrimination laws applicable to employment by closing a potential loophole in the hostile work environment cause of action.

A natural corollary to the provision of such an exception is the determination of damages for hypersensitive employees who prevail under it, as well as for hypersensitive employees who prevail in regard to objectively hostile work environments. Since hypersensitive employees have been precluded from redress for claims based on their unusual sensitivities, these issues have not been adequately addressed. This Article sets forth a framework for determining the scope of the damages available to hypersensitive employees who prevail on hostile work environment claims by looking to the "eggshell skull" rule established in tort law.[112] That rule can be applied both to claims made pursuant to the exception to the objective reasonableness standard set forth in this Article, and to claims based on objectively hostile work environments.[113] Thus, it provides a consistent method for determining damages arising from actionable hostile work environment claims brought by hypersensitive employees.

It is unlikely that the courts or the EEOC meant for the objective reasonableness standard to be used as a means to protect those who attempt to escape liability for harassment by utilizing an unusual sensitivity as the tool for the harassment. The discussion set forth herein attempts to provide a cogent method for addressing such situations, with the hope of eliminating a potentially dangerous loophole in the hostile work environment cause of action.

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[111] *See supra* part II.D.

[112] *See supra* part III.

[113] *See supra* part III.